STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 26, 2014
v	No. 315166 Saginaw Circuit Court
ELISHER LEWIS MARLOW, Defendant-Appellant.	LC No. 12-037690-FH

Before: BORRELLO, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Defendant, Elisher Marlow, appeals by right his conviction following a jury trial of one count each of carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f, resisting and obstructing, MCL 750.81d, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. On each felony-firearm charge, the trial court sentenced defendant to serve two years' imprisonment "to run preceding and consecutive to remaining counts, but concurrent to each other." For resisting and obstructing, the court sentenced defendant to serve two to three years' imprisonment. For felon in possession of a firearm and CCW, the court sentenced defendant to serve 28 months to 7 years, 6 months' imprisonment. We affirm.

I. FACTS

On July 21, 2012, at 1:54 p.m., Saginaw County 911 received a call from a woman reporting that an African-American male wearing all black clothing was looking into the windows of her house. She stated that he was carrying something underneath his shirt that she could not identify. At the same time, 911 received a call from a man indicating that the person looking in the windows was wearing a baseball cap with red on it. The police received additional information that the suspect was seen near Michigan and Lee streets. Saginaw Police Department Officer Brian Guest drove to the area to investigate and did not find anyone matching the description.

At 2:15 p.m., Guest received a call regarding a shooting on the northeast side of the city. Guest began driving from Michigan and Lee east over the Rust Street Bridge. When he reached Rust and Fordney on the other side of the river, he spotted a man walking in a field who matched the description from the 911 calls. That man was defendant. Guest noticed that defendant was

holding something underneath his shirt that was a couple of feet long, which he held at an angle from the right shoulder down to the left hip. Guest suspected that the object was a long gun. Guest drove onto the field and headed toward defendant in order to investigate the possible connection between the 911 call information and defendant. Guest got as close as 10 to 12 feet when defendant, who was facing Guest at the time, turned his back to Guest and stopped; he then twice looked over his shoulder at Guest, then back to the object, arousing Guest's suspicions. At that point, Guest, who was in full uniform and driving a "semi-marked" police car, activated his flashing lights. Defendant began to flee. Guest then activated his siren, but defendant kept running, causing Guest to begin pursuit.

Guest lost sight of defendant at the southwest corner of an historic building called Cushway House. He regained sight of him at the northwest corner of the building. Guest lost sight of defendant again and eventually found him hiding behind a "port-a-john" in a nearby parking lot. Defendant was no longer holding an object underneath his shirt. Guest arrested defendant, handcuffed him, and searched him for weapons. Saginaw Police Officer Lawrence Kehoe arrived on the scene and recovered a rifle from underneath a staircase outside Cushway House.

II. FOURTH AMENDMENT

Defendant argues that his constitutional right to be free from unreasonable search and seizure was violated. This argument was not made below and is thus not preserved for appeal. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). Unpreserved constitutional errors are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.* [(citations omitted).]

The Fourth Amendment of the United States Constitutions provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Michigan has a parallel constitutional provision, Const 1963, art 1, §11, which "is to be construed to provide the same protection as that secured by the Fourth Amendment, absent compelling reason to impose a different interpretation." *People v Collins*, 438 Mich 8, 25; 475 NW2d 684 (1991) (internal quotation marks omitted).

"The Fourth Amendment is not a guarantee against all searches and seizures, but only against those that are unreasonable." *People v Shabaz*, 424 Mich 42, 52; 378 NW2d 451 (1985).

Under both federal and state law, an investigatory stop of a person is reasonable if the police have "reasonable suspicion" that crime is afoot. *United States v Cortez*, 449 US 411, 417–418; 101 S Ct 690; 66 L Ed 2d 621 (1981); *Terry v Ohio*, 392 US 1, 26-27; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *Shabaz*, 424 Mich at 54.

> Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture, the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. [*Shabaz*, 424 Mich at 55 (citation and quotation omitted).]

Considering the totality of the circumstances in this case, Guest had a reasonable, articulable suspicion that criminal activity was afoot, so as to justify his investigatory seizure of defendant. Two separate 911 calls together described an African-American male wearing dark clothing and a hat with red on it who had been spotted looking into the windows of a home of one of the callers. One of the callers stated that the suspect had an object underneath his shirt. Guest had this information when he spotted defendant walking across a field. Defendant matched the description from the 911 calls and appeared to be carrying something under his clothing, which Guest surmised from its shape and size was a weapon. When asked why he wanted to stop defendant, Guest responded, "Because he fit the exact description of what was given for the call on the west side of the river." Guest testified that he believed someone could make it on foot from the area where the initial 911 call originated to the area where he spotted defendant in the time period between the two events. Defendant fled as Guest approached. Flight from the police by itself does not justify a seizure, but "flight may be a factor to be considered in ascertaining whether there is reasonable suspicion to warrant a *Terry* stop . . . ." *Shabaz*, 424 Mich at 62. As the United States Supreme Court stated in *Illinois v Wardlow*, 528 US 119, 124; 120 S Ct 673; 145 L Ed 2d 570 (2000), "Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." Given this set of facts, we conclude that Guest had the required articulable suspicion to justify the investigatory seizure that led to defendant's arrest.

III. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence was insufficient to support his conviction of resisting and obstructing. A defendant's challenge that the evidence was insufficient to convict is reviewed de novo. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). "In determining the sufficiency of the evidence, this Court reviews the evidence in the light most favorable to the prosecution." *Id.* at 175.

MCL 750.81d(1) states, "[A]n individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony." Guest was in full uniform driving a semi-marked police car when he approached defendant with police lights flashing. Under *Terry/Cortez*, Guest had

the authority to detain defendant for the limited purpose of investigating whether he was armed and whether he was the same suspect described by the 911 callers. Guest's police lights were an unequivocal show of authority commanding defendant to stop. See *People v Mamon*, 435 Mich 1, 12; 457 NW2d 623 (1990). Even if defendant did not immediately recognize that Guest was attempting to detain him, any doubt would have been dispelled when Guest activated his siren and began pursuing defendant as he fled on foot. For the purpose of the obstructing statute, " 'Obstruct' includes . . . a knowing failure to comply with a lawful command." MCL 750.81d(7)(a). Guest's actions carried an implied command to stop. Under *Terry*, that command was lawful, and the facts suggest defendant knew of Guest's command. From this, a reasonable juror could have found defendant guilty of violating the statute beyond a reasonable doubt. See *People v Pohl*, 207 Mich App 332, 333; 523 NW2d 634 (1994).

In reaching this conclusion, we reject defendant's contention that *City of Pontiac v Baldwin*, 163 Mich App 147, 152; 413 NW2d 689 (1987), compels the result in this case. Initially, we are not bound by *Baldwin* because it was decided before November 1, 1990. See MCR 7.215(J)(1). Furthermore, *Baldwin* is materially distinguishable from the case at bar. In *Baldwin*, 163 Mich App at 152, this Court held that an individual could not be convicted of resisting and obstructing for declining to answer questions posed by police officers. Here, by contrast, defendant ignored commands to stop and fled from Guest, who, pursuant to *Terry/Cortez*, had lawful authority to detain defendant. Defendant's flight in the face of Guest's command to stop was sufficient for a rational jury to find, beyond a reasonable doubt, that defendant was guilty of resisting and obstructing. See MCL 750.81d(7)(a); *Pohl*, 207 Mich App at 333.

IV. SENTENCING GUIDELINES

Defendant challenges the scoring of prior record variable (PRV) 7 and offense variable (OV) 19. Defendant's challenge to the scoring of PRV 7 is predicated on the Court first concluding that his conviction for resisting and obstructing was not supported by sufficient evidence. That argument having failed, this one necessarily fails as well.

> Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).]

OV 19 was scored at ten points, which is appropriate where "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice[.]" MCL 777.49(c). Officer Guest gave defendant an unequivocal command to stop and defendant continued to flee. He stands convicted of obstructing Guest as he was attempting to perform his duties. "[I]nterfering with a police officer's attempt to investigate a crime constitutes interference with the administration of justice." *People v Passage*, 277 Mich App 175, 180; 743 NW2d 746 (2007). See also *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). OV 19 was properly scored at ten points. See *People v Ratcliff*, 299 Mich App 625, 633; 831 NW2d 474

(2013), vacated in part on other grounds 495 Mich 876 (2013) (upholding the scoring of OV 19 where the defendant fled from police officers despite an order to stop).

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his trial counsel was ineffective in two ways: (1) defense counsel failed to move to suppress evidence defendant alleges was illegally obtained, and (2) defense counsel failed to object to defendant's sentencing guideline scoring. As both predicates to the argument have been rejected, his claim of ineffective assistance is also rejected. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Affirmed.

/s/ Stephen L. Borrello
/s/ Deborah A. Servitto
/s/ Jane M. Beckering